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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1067

REGENCY ELECTRONICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATION LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 84-92) is reported at 523 F.2d 522. The decisions and orders of the National Labor Relations Board are reported at 198 NLRB 627 (Pet. App. 36-38), 200 NLRB 625 (Pet. App. 39-52), and 215 NLRB No. 157 (Pet. App. 66-83).

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1975 (Pet. 3). The petition for a writ of certiorari was filed on January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that a sample ballot that the company circulated before the first representation election warranted setting aside that election.

2. Whether the Board properly found that the union's offer to waive initiation fees did not warrant setting aside the second representation election.

STATUTE INVOLVED

The National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, as amended, 29 U.S.C. 151, *et seq.*, provides in pertinent part:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

STATEMENT

On December 17, 1971, pursuant to a representation petition filed by the Union,[1] the National Labor Relations Board conducted an election (hereinafter the "first election") among the employees at petitioner's plant; a majority of votes was cast against the Union. The Union filed objections to the election, alleging that on the day before the election the Company distributed to its employees a leaflet containing a facsimile of the Board's Sample Ballot, to which it added an X and a red heart on the "No" square (Pet. App. 7), thereby creating the impression that the Board endorsed the Company's position. Following an investigation, the Board set aside the first election and directed a new election (hereafter the "second election") (Pet. App. 19).

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[1]International Union of Electrical, Radio and Machine Workers, AFL-CIO.

The second election, conducted on March 24, 1972, resulted in a vote of 133 to 112 in favor of the Union. The Company filed objections to the second election, in which it alleged, *inter alia*, that the Union had offered to waive initiation fees and dues, thereby interfering with the employees' free choice (Pet. App. 23-24). Following an investigation, the Board's Acting Regional Director recommended that the objections be overruled (Pet. App. 21-35). On August 1, 1972, the Board adopted this recommendation and certified the Union as the employees' bargaining representative (Pet. App. 36-38).

The Company thereafter refused to bargain with the Union; the Board, finding that the Company thereby violated Section 8(a)(5) and (1) of the Act, entered a bargaining order (Pet. App. 39-50). The Company sought review in the court of appeals, contending, *inter alia*, that the Board's order should be set aside because the sample ballot that the Company had distributed just before the first election had not interfered with that election.[2] The court of appeals enforced the Board's order, concluding, *inter alia*, that "the use of this type of information under the surrounding circumstances might have had an undesirable impact on the employees' freedom of choice" (Pet. App. 60).

While the Company's petition for rehearing was pending before the court of appeals, this Court announced its decision in *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270, in which it held that a union's offer to waive initiation fees only of employees who sign authorization cards prior to an election impermissibly interferes with the employees' right to refrain from union activities and their statutory right to a free and fair election (*id.* at 277).

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[2]The Company did not there challenge the Board's decision to overrule its objection to the Union's offer to waive initiation fees and dues.

Accordingly, the court of appeals remanded the case to the Board to conduct a hearing on the Company's objection to the Union's offer to waive initation fees and dues (Pet. App. 64-65).

On remand, the Board found that the Union had an established policy of exempting from payment of initiation fees *all* employees employed at the time of an election regardless of whether such employees joined the Union before or after the election (Pet. App. 70). The Board further found that, in the campaign preceding the first election, the Union distributed "charter membership" cards to employees who signed authorization cards (Pet. App. 76). The front of the cards contained the following language (Pet. App. 75):

IUE-AFL-CLC
CHARTER MEMBER (SEAL)
Exemption
from
Initiation
Fee

THIS CARD IS VALUABLE—KEEP IN YOUR WALLET

On the reverse side, the card read:

CHARTER MEMBERSHIP CARD
This is to certify that:

_____
(Name of Charter Member)

has, during an organizational drive at _____ located at _____ signed an authorization card signifying his desire to be a member of the International Union of Electrical, Radio and

Machine Workers, AFL-CIO. In bestowing membership on him, he is hereby exempt from payment of any initiation fee, now or at any future time, and will be listed as a charter member at the above plant.

_____ _____
Secretary-Treasurer International President

On March 9, 1972, fifteen days before the second election, the Union mailed a leaflet to all employees which stated (Pet. App. 77):

Q. WILL I HAVE TO PAY AN INITIATION FEE IF THE UNION IS VOTED IN?

A. ABSOLUTELY NOT! ANYONE PRESENTLY WORKING AT REGENCY IS HEREBY GUARANTEED THAT THEY WILL NOT PAY ANY INITIATION FEE.

The Board concluded that this leaflet clarified the Union's waiver policy, which properly applied to all unit employees, not only to those who signed cards prior to the election. Accordingly, the Board overruled the Company's objection and reaffirmed the bargaining order (Pet. App. 77-81, 82-83).

The court of appeals enforced the order, finding that the Board "considered all of the evidence including the charter membership cards in deciding that, taken in total context, the cards and other Union conduct did not amount to a *Savair* violation" (Pet. App. 90).

ARGUMENT

1. The Company contends (Pet. 8-13) that the Board's decision to set aside the first election because of the

Company's facsimile sample ballot was based on a rule first announced by the Board in *Allied Electric Products, Inc.*, 109 NLRB 1270 (1954);[3] and that such a rule is invalid because it was not promulgated in accordance with the rule-making procedures of the Administrative Procedure Act, 5 U.S.C. 553(b) and (c). It is established, however, that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. * * * The Board's judgment that adjudication best serves this purpose is entitled to great weight." *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 294;[4] see also *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765.

The Board correctly applied the *Allied Electric Products* principle to the instant case, where the distributed material was a facsimile of an official Board document, and was

[3]In that case, the Board set aside an election upon finding that reproduction by the union of altered copies of the Board's official ballot tended to interfere with employee free choice. The Board added that "in the future it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed, will set aside the results of any election in which the successful party has violated this rule." 109 NLRB at 1272 (footnotes omitted).

[4]The Company's reliance on *Morton* v. *Ruiz*, 415 U.S. 199 (Pet. 10-11), is misplaced. In *Ruiz* the Court held that the Bureau of Indian Affairs could not deny certain welfare benefits to Indians who lived off reservation, where the rule announcing this policy had been inserted in the Bureau's policy manual, but had been promulgated neither pursuant to the rulemaking provisions of the Administrative Procedure Act nor in the course of an adjudication. Here, however, there was an adjudicative basis for the rule at issue.

altered to give the appearance of favoring one of the parties to the election.[5] As the court of appeals observed (Pet. App. 58):

> It is beyond dispute that the duplicated ballot is identical in size and content with the Board's sample official ballot. It follows that here we are concerned with the Company's use of an official Board document in its flyer or leaflet. We do not have the use of a simulated or sketchy ballot or obvious propaganda statements in isolation from the official Board document. [Footnote omitted.]

2. Contrary to the Company's further contention (Pet. 15-17), the decision below does not conflict with *National Labor Relations Board* v. *Savair Manufacturing Co., supra.* There, this Court noted that the union's legitimate interest in waiving initiation fees could be preserved without election interference if the waiver were made available to all employees who join "the union before an election [and] also to those who join after the election." 414 U.S. 272-274, n. 4. Here, it is undisputed that the Union had an established policy of waiving initiation fees for all employees employed on the date of the election, irrespective of when they joined the Union. The Board and the court below correctly found that any misunderstanding that may have been caused by the Union's use of the term "charter member" or of charter membership cards was resolved by subsequent Union communications explaining that the waiver policy was available to all employees regardless of when they joined the Union (*supra*, p. 5).

[5]Compare *Clarytona Manor, Inc.*, 192 NLRB 781, enforced, 479 F. 2d 976 (C.A. 7), with *Rebmar, Inc.*, 173 NLRB 1434.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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